71-1424

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1294

JAMES W. FITZGERALD, *Petitioner*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, *Respondent*

SOUTHERN PACIFIC COMPANY, a corporation, *Real Party in Interest*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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Petitioner, James W. Fitzgerald, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case (1 Civil No. 30, 809) on February 3, 1972.

STATEMENT OF THE CASE

This is a proceeding instituted in the Court of Appeal, First Appellate District, Division One, to obtain a writ of mandate to compel the respondent, the Superior Court of the State of California, in and for the City and County of San Francisco, to deny the motion of Southern Pacific Company to dismiss, on the basis of forum non conveniens, an action for personal injuries arising out of an accident occurring in the State of Texas instituted by James W. Fitzgerald as an injured employee of Southern Pacific Company under the Federal Employers' Liability Act, in connection with an injury which happened on September 9, 1968, while plaintiff was working as a brakeman on defendant's railroad train.

Defendant Southern Pacific Company, a corporation, is a common carrier by railroad engaged in interstate commerce in the State of California and in the State of Texas, and the principal place of business of said defendant is in San Francisco, California.

On March 3, 1969, James W. Fitzgerald, petitioner herein, commenced an action in the respondent Superior Court against Southern Pacific Company, a corporation, as the defendant, for a recovery of personal injuries sustained by him while working as a brakeman, employed by said railroad in its work as a common carrier in interstate commerce.

On April 21, 1969, defendant filed in said respondent Court an answer admitting the allegations as to interstate commerce and common carriage and ad-

mitting its principal place of business in the State of California in the City and County of San Francisco.

On April 21, 1969, defendant filed in said respondent Court and served upon petitioner a motion to dismiss on the ground of forum non conveniens and also filed and served a declaration and a memorandum of points and authorities in support of said motion, and in said declaration, defense attorney, Robert W. Taggart, listed a number of people as potential witnesses in the case, but did not set forth what their testimony would be or how or in what respect it was material, and most of the witnesses listed were either Southern Pacific doctors or Southern Pacific employees.

Claim Agent John D. Caldwell also filed a declaration, but said nothing as to the nature and character of the testimony the alleged witnesses would present, and he listed only ten employees and two company doctors.

On May 12, 1969, petitioner filed with the Court a brief and argument in opposition to the motion to dismiss and filed a declaration of Attorney Clifton Hildebrand setting forth in detail with copies of statements of the witnesses showing that there was an unexpected, violent, unnecessary and sudden stop which caused the accident and the resulting injuries and showing the testimony of the witnesses would in fact be unfavorable to the defense.

This declaration also showed that the legal department and the chief claim agent of the defendant

Southern Pacific Company are located in San Francisco and that it has been the practice through the years to sue the Southern Pacific Company in F.E.L.A. cases in San Francisco and that most of the judges have denied motions to dismiss on the ground of forum non conveniens.

This declaration also pointed out that Attorney Hildebrand is a representative of the Brotherhood of Railroad Trainmen and was selected by the petitioner to handle his case and that prior to the case of *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 12 L.Ed.2d 89, 11 A.L.R. 1196, holding that the brotherhood had the right to recommend counsel, proceedings had been held in El Paso, and Hildebrand had been enjoined from practicing law or trying cases in El Paso.

On August 6, 1969, Judge Rolf filed a memorandum decision denying the motion to dismiss, and an order to that effect was filed on September 12, 1969 (Exhibits A and B).

Interrogatories to defendant were served by petitioner on June 22, 1970, and the railroad answered, stating that statements had been obtained from various witnesses, but refusing to disclose these statements. After arrangements were made for taking various depositions, interrogatories were served upon the plaintiff by defendant on July 6, 1970, and were answered on August 10, 1970.

Records were then obtained by subpoenas duces tecum of various doctors who had seen the plaintiff.

On May 18, 1971, defendant filed its notice of motion to renew motion to dismiss, together with a declaration of Claim Agent John W. Caldwell, but no statements were filed as to the nature and character or materiality of the testimony of the alleged witnesses to be called for the trial of the case by the defense. There were conflicting declarations filed as to the necessity of having San Francisco doctors, but there was no denial of the claims made by Fitzgerald that he was dissatisfied with the advice given to him by the company doctors in El Paso and that he had sought and obtained advice from doctors in the San Francisco Bay Region, including a myelogram by Dr. Robert McIvor, an orthopedist. A motion to dismiss was duly presented and argued before the Honorable Ira A. Brown, Jr., Judge of the Superior Court, but no testimony was taken, and the argument revolved around the conflicting declarations presented. On September 13, 1971, said Ira A. Brown, Jr., filed notice of intended decision, and on September 20, 1971, Robert W. Taggart, attorney for the Southern Pacific Company, filed "Agreement to Conditions of Dismissal" (Exhibit C). On December 1, 1971, Ira A. Brown, Jr., Judge of the Superior Court, filed his order of dismissal on the ground of forum non conveniens (Exhibit D).

The plaintiff alleges in his complaint that the defendant was negligent in connection with the accident that happened to him in the defendant's yards in El Paso, Texas, when the train came to an unexpected, violent and sudden stop, causing the plaintiff's acci-

dent and injuries. Petitioner has filed various statements of witnesses supporting plaintiff's claim, and defendant filed nothing to show how or in what manner the accident happened or that the witnesses defendant alleged were needed will give relevant or necessary testimony or what that testimony will be. As to the conflicting declarations concerning the necessity for medical testimony, judging merely from these declarations, one would have to have a crystal ball to arrive at an opinion as to the necessity for the medical testimony, but it does appear various examinations were had in the Bay Region, advice was given to the plaintiff, a myelogram was taken, and the defense had two doctors examine the plaintiff in this area, and then the defense obtained all the medical records from the three doctors who had seen plaintiff and that the course of treatment followed after the doctors in the Bay Area had seen the plaintiff was along the lines suggested by the Bay Area doctors, rather than the treatment earlier followed by the doctors in El Paso.

The undisputed factual matters giving rise to this proceeding raise a very simple issue as to whether an F.E.L.A. plaintiff can pursue his admitted right to select the venue and lodge and carry on his suit against his employer railroad at the principal place of business of the railroad. This is not a mere motion to transfer venue, but is a motion for the more drastic action for the dismissal of the case. The defense has raised no issue on the liability, and they have filed nothing to show as to what the witnesses

will testify or how their testimony may be material, but the plaintiff has filed various declarations of the witnesses to show that there is no real issue on liability.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the application of the Federal Employers' Liability Act. In relation to the power of the state court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A. §56), the decision of the California court is in conflict with *Pope v. Atlantic Coast Lines R.R. Co.*, 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 749, which is the latest expression of the United States Supreme Court that there is no statutory or other authorization for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act.

It is well settled in California "that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues." (*Hansen v. Cramer*, 39 Cal. 2d 321, 245 Pac. 2d 1095.)

California courts regularly exercise jurisdiction in transitory causes of action arising out of claims connected with transactions which occurred in other states where the actions are brought against resident debtors or foreign corporations doing business in California. *Loranger v. Nadeau*, 215 Cal. 362; *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862; *Reich v. Purcell*, 67 Cal. 551, 555, modifying the

rule to the extent of saying that when California takes jurisdiction out of state tort actions, California may modify the rule of damages. See *McKee v. Dodd,* 152 Cal. 637, 93 Pac. 854, 125 Am. St. Rep. 82, 14 L.R.A.N.S. 780; *Ryan v. Clark Equipment Co.,* 268 Cal. App. 2d 679; *Scott v. Burke,* 39 Cal. 2d 388.

In California, an F.E.L.A. plaintiff suing a debtor doing business in California should have the same right to sue as any other creditor on a debt incurred outside the state. To deny this F.E.L.A. plaintiff such a right is to deny the privileges and immunities granted him under Article IV and the 14th Amendment of the United States Constitution.

McKnett v. St. Louis and S.F. Ry. Co., 292 U.S. 230, 78 L.Ed. 1227;

Kelly v. Knott, 163 Southern 64, citing the applicability of United States Supreme Court cases;

Estate of Waits, 23 Cal. 2d 676, 146 Pac. 2d 5.

This California decision is contrary to the legislative intent of Congress and to the decisions of *McGovern v. Philadelphia & Reading R.R. Co.,* 235 U.S. 389, 59 L.Ed. 283, and *American Railroad Company v. Birch,* 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879, where Mr. Justice McKenna recognizes the personal representative as the plaintiff in a death action and says as to the wife, children or parents, "What difference can it make where they may reside?"

The decision in this case is contrary to the legislative intent.

The Federal Employers' Liability Act gives the plaintiff the choice of venue (45 U.S.C.A. §56). The Act specifically says the action may be brought where "the defendant shall be doing business at the time of commencing such action." The legislative intent was expressed by Senator Borah of Idaho, who was in charge of Senate Report No. 4320 H.R. 17263, 61st Cong., 2nd Sess., 45th Cong Rec. (1910) 4034:

> "The bill enables the plaintiff to find a corporation at any point or place or state where it is actually carrying on business and there lodge his action if he chooses to do so."

In *Baltimore and Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L.Ed. 28, this Court held that §6 of the F.E.L.A. creates the venue as a matter of federal privilege and that a denial of this federal privilege is governed by federal and not by state law. Mr. Justice Reed speaks of the legislative intent as follows:

> "The language finally adopted must have been deliberately chosen to enable the plaintiff in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.'"

At page 33 of the Lawyer's Edition, the Court in the *Kepner* case said:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or

> expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910 for the benefit of employees."

Similarly, in the case of *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, Mr. Justice Reed in reaffirming the *Kepner* case, supra, stated:

> "The opportunity to present causes of action under the F.E.L.A. in the state courts came, however, not from the state law, but from the federal. . . . This is so because the federal constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose."

Mr. Justice Jackson in his concurring opinion stated:

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in either a federal or a state court in which to ask his remedy. There is nothing which requires the plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner.
>
> "It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere."

THE ISSUES

Can a state court which would exercise its jurisdiction of a transitory action not arising under the Federal Employers' Liability Act decline to exercise its jurisdiction because the action is brought under the F.E.L.A.?

Are railroad employees to be discriminated against by dismissing their actions in California where they have the statutory right to bring their F.E.L.A. cases here?

If a plumber from Arizona can maintain his action against a tort debtor where he finds him in California as to an accident in Arizona, can a conductor from Texas be dismissed when he brings his F.E.L.A. debt action in California at the principal place of business of the Southern Pacific Transportation Company? Cf. *Scott v. Burke,* 39 Cal. 2d 388.

If a housewife from Oklahoma can sue a California resident on a traffic accident happening in Oklahoma City because ". . . as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found," is the same right to be denied to an F.E.L.A. conductor plaintiff from Texas suing a California corporation on an F.E.L.A. tort debt as to an accident in Texas? See *Loranger v. Nadeau,* 215 Cal. 362.

If a widow from Oregon, under Article XII, §15 of the California Constitution, can maintain an action against a Michigan corporation where found in California on an accident (tort debt) which took place in Oregon, can a similar right be denied to a conductor

from Texas who sues the corporate debtor where he finds it? Cf. *Ryan v. Clark Equipment Co.* (1970) 268 Cal. App. 2d 679.

If Thomson, a citizen of California, can maintain his action on a Texas debt wherever he finds the Continental Casualty Company in California, can California deny plaintiff Fitzgerald, a citizen of Texas, the right to maintain his action on a Texas debt where he sued the Southern Pacific Company in San Francisco at its principal place of business—where he finds it? See *Thomson v. Continental Ins. Co.*, 66 Cal. 2d 738, 743 by Mr. Justice Peters, modifying *Price v. A.T. & S.F. Ry. Co.*, 42 Cal. 2d 577.

In view of the above instances and since the *Price* case, supra, has been modified to allow a citizen of California to maintain an action on a Texas debt, it is now clear that *Schultz v. U.P.*, 118 Cal. App. 2d 169, correctly stated the law at p. 181:

> "The courts of California have consistently entertained causes based on transitory causes of action against foreign corporations doing business in this state, brought by a citizen of this state where the tort occurred outside the state. Since a citizen of this state, resident or nonresident, has the privilege of suing any person or corporation who may be found in the state on a transitory cause of action which arose outside the state, a citizen of a sister state has the same privilege secured to him by the Constitution of the United States."

As *Schultz* and the United States Supreme Court cases cited therein, such as *McKnett v. St. Louis,*

292 U.S. 230, declare, does the ruling of Judge Brown in the case at bar "involve a discrimination against Employers' Liability Act suits" so as to offend against the Privileges and Immunities Clause of the Constitution? *Schultz,* p. 175, 14th Amendment, Article IV, §2.

Is this consistent with *Chambers v. B. & O.,* 207 U.S. 142 at 148:

> "Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void because in conflict with the supreme law of the land."

and Amendment 14, U.S.C.A. on Due Process of Law, page 3, §1?

Is §410.10, California Code of Civil Procedure, reading,

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

applicable to C.C.P. §410.30 as to forum non conveniens and C.C.P. §904.1 (c) as it may be interpreted to discriminate against F.E.L.A. plaintiffs in the light of the federal constitution and also Article XII, §16, allowing transitory actions against corporations where they are found in California and relating to the place of trial and not merely the place where an action may be commenced? See *Searles v. Greyhound Corp.* (1960) 180 Cal.App.2d 463.

Since *Miles v. Illinois Central Railway Co.,* 315 U.S. 669, 86 L.Ed. 1129 is still the law, as stated in

Pope v. Atlantic Coast Line, 345 U.S. 379, 97 L.Ed. 1094, the last word on the subject from the high court, can the California courts shut out railroad employees from its courts and defeat the Congressional legislative purpose on the amended F.E.L.A. as stated by Senator Paynter (86 L.Ed. 1133):

> "I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried."

Mandate under C.C.P. §400 was the Legislature's 1961 remedy to bring California procedure in line with the Federal rules and procedure found in Federal Rule 12, 28 U.S.C.A., as stated in *United Rubber, etc. v. Lee*, 269 F.Supp. 708 (1967):

> "A challenge to venue cannot be made after the litigation has progressed beyond the initial required pleadings. A party cannot sit back and have the litigation processed up to the point of an imminent trial date and then raise the issue."

ARGUMENT

I

MANDATE IS THE APPROPRIATE REMEDY

First, the legislature enacted §400 of C.C.P. to eliminate time-consuming venue appeals and to provide mandate as a substitute so that the matter of venue could be expeditiously disposed of in the pleading stage.

C.C.P. §400 provides as follows:

> "When an order is made by the superior court granting or denying a motion to change the place of trial, the party aggrieved by such order may, within ten days after service of a written notice of the order, or within such additional time not exceeding twenty days as the court may within the original ten days allow, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring trial of the case in the proper court. *The petitioner shall file a copy of such petition in the trial court immediately after the petition is filed in the court of appeal.* The court of appeal may stay all proceedings in the case, pending judgment of the petition becoming final. *The clerk of the court of appeal shall file with the clerk of the trial court a copy of any final order or final judgment immediately after such order or judgment becomes final.*"

This procedure is also in line with the Federal Rules and Procedure found in Federal Rule 12, 28 U.S.C.A., as stated in *United Rubber, etc. v. Lee,* 269 F. Supp. 708 (1967):

> "A challenge to venue cannot be made after the litigation has progressed beyond the initial required pleadings. A party cannot sit back and have the litigation processed up to the point of an imminent trial date and then raise the issue."

In *Hennigan v. Boren,* 243 Cal. App. 2d 813-815, hearing denied by California Supreme Court September 28, 1966, the Court said:

> "Prior to the year 1961, an order changing or refusing to change the place of trial was an appeal-

able order. (*Harris v. Alcoholic Bev. Control, etc. Board,* 197 Cal. App. 2d 759 [18 Cal. Rptr. 151]; *Brun v. Evans,* 80 Cal. App. 74 [251 P. 330].) In 1961 the Legislature recognized the necessity of providing a speedier procedure for review of venue orders and deleted the provision allowing an appeal from an order granting or denying a change of venue authorized by Code of Civil Procedure §963, and enacted Code of Civil Procedure, §400, which permits review by writ of mandamus of an order of the superior court granting or denying a motion for change of venue. (Witkin, Cal. Procedure, 1965 Supp., Actions, §253, p. 308) . . .

"Mandate is the appropriate remedy to obtain relief from an order granting or denying a motion for change of venue. (*Laurel Crest, Inc. v. Superior Court,* 235 Cal. App. 2d 69 [44 Cal. Rptr. 867]; *Henson v. Superior Court,* 218 Cal. App. 2d 327 [32 Cal. Rptr. 404].) The history of the legislative change in abolishing the right of appeal from an order granting or denying a venue change as contained in Code of Civil Procedure, §400, establishing the mandamus procedure, reflects that under the prior law making the order appealable, venue appeals were time-consuming and resulted in substantial delay. California was among the small minority of states allowing an appeal from venue orders. The mandate procedure is more expeditious and provides for a direct review. (38 State Bar J. 664, 665; 36 State Bar J. 706, 707.)

"An appeal will not lie from an order denying a change of venue by reason of the amendment of Code of Civil Procedure, §963, inasmuch as mandamus is the proper remedy pursuant to the

enactment of Code of Civil Procedure §400. (*Adams v. Superior Court,* 226 Cal. App. 2d 365 [38 Cal. Rptr. 164].)

"The right of appeal is wholly statutory and no judgment or order is appealable unless expressly authorized by the Constitution or statute. (*In re Brekke,* 233 Cal. App. 2d 196 [43 Cal. Rptr. 553]; *Title Insurance & Trust Co. v. California Development Co.,* 159 Cal. 484 [114 P. 838]; *Collins v. Corse,* 8 Cal. 2d 123 [64 P. 2d 137].)"

As the Court says, the sole right of appeal from an order granting or denying venue was changed and the more expeditious mandamus procedure has been substituted providing for a direct review.

The opposition must also have similarly construed §400 C.C.P., because the opposition in six cases in San Francisco filed for writs of mandate under §400 C.C.P. when their motions to dismiss were denied. The opposition also filed for mandate in *Great Northern Ry. Co. v. Curtin,* 12 Cal. App. 3d 105.

Since the legislature did not repeal C.C.P. §400 with the enactment of the new C.C.P. §904.1(c), and since said §400 still remains unchanged, we feel that it is sound to argue that the purpose of §400 still remains to settle the matters of venue at the pleading stage. This is the only way to get an expeditious remedy by writ of mandate rather than by long delayed appeal. Under these circumstances, it would seem reasonable that the litigant has a choice of procedure depending upon the state of the record and how he desires to proceed.

Furthermore, it is our position that the maxim of forum non conveniens cannot be applied to this case and that the dismissal by Judge Brown was beyond his power and unconstitutional and not an application of the discretionary grant of dismissal under forum non conveniens, if such discretion does indeed exist in certain cases of non-residents suing non-residents on an out-of-state case.

This view is also consistent with prior rulings of this Court that diligence is required in making a dilatory motion. This should be especially so where such a motion may have the effect of dismissing an action which the plaintiff has an admitted right to institute. It is certainly not in line with the humanitarian purposes of the F.E.L.A., which is to be liberally construed as a remedial act, unduly to delay the detrmination of plaintiff's case. (See *Urie v. Thompson,* 69 S. Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282, 11 L.R.A.2d 252; *Corey v. Southern Pacific,* 69 S.Ct. 275, 335 U.S. 520, 93 L.Ed. 208). In *Sleeman v. Chesapeake and Ohio,* 290 F.Supp. 817 at 828, the Court said: "The time in court is a precious commodity which should not be wasted by needless delays."

II

This motion to dismiss was first made at the pleading stage and was denied by Judge Rolph. Twenty-five months after answer and following extensive trial preparation and discovery, a second motion to dismiss was filed by defendant, which motion was granted by Judge Brown seven months later on December 20,

1971, after the three-year statute of limitations had run on the original action. Judge Brown did require the defendant to waive the statute if plaintiff filed within a year where the accident happened. So the effect of the order was to limit plaintiff's venue to the place where the accident happened.

III

The delay in filing this second motion to dismiss violates the well-established and proper rule that dilatory motions must be made within a reasonable time. *Hart v. Forgeus,* 184 Cal. 327; *Adams v. Superior Ct.,* 226 Cal. App. 2d 365.

IV

THE LEGISLATIVE PURPOSE

The Federal Employers' Liability Act, 45 U.S.C.A. §56 (1908) at first required that the action must be brought against the defendant railroad only where the defendant had its principal place of business. *Smith v. Detroit Railroad* (1909) 175 F. 506.

V

The Taft Administration and Congress felt that this venue and jurisdiction was too restrictive and in 1910 the law was amended to provide that the action may be brought "where the defendant shall be doing business." (45 U.S.C.A. §56).

VI

The United States Supreme Court has construed the legislative intent of the F.E.L.A. as to venue in *B. & O. v. Kepner,* p. 23, where Mr. Justice Reed commented:

> "The language finally adopted must have been deliberately chosen to enable the plaintiff in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.'"

At the same time, Mr. Justice Reed also stated:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910 for the benefit of employees."

As further showing the legislative intent of Congress not to limit the F.E.L.A. plaintiff to venue at the place of the happening of the accident, as Judge Brown has done in the case at bar, in 1947 the 80th Congress, 1st Session, refused to pass the Jennings Bill, which was H.R. 1639 and which provided that an F.E.L.A. plaintiff must sue where the accident happened.

VII

It is not consistent for the Congress to place venue and thereafter for the courts to dismiss the case

where the venue was placed on the ground that the venue is not convenient to the court.

U.S. v. National City Lines, 334 U.S. 573, 92 L.Ed. 1584: Mr. Justice Rutledge as to the forum non conveniens maxim:

> "To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by forum non conveniens, would have been incongruous, to say the least."

Similarly, Mr. Justice Traynor, in *Estate of Waits,* 23 Cal. 2d 676, in holding that the plaintiff administrator of a railroad employee killed on duty outside of California could sue the railroad wherever it does business, and likewise in California, said:

> ". . . it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

Similarly, even in federal court where a transfer rather than dismissal is allowed specifically by Judicial Code 1404 (a), the court said in *Cullinan v. New York Central R.R. Co.,* 83 F.Supp. 870:

> "This Court is also of the opinion that §6 of the Federal Employers' Liability Act gives to an injured employee a right to select the forum in which he will bring his action. Cf. *Akerly v. New York Central R. Co.,* 6 Cir., 1948, 168 F.2d 812; *Krenger v. Pennsylvania R. Co., D.C.E.D. N.Y.* 1948, 8 F.R.D. 65. This right would indeed be an illusory one if it could be defeated by the transfer

of a case such as this one, brought in the forum of the defendant's domicile."

Also, in California, where venue is conferred by Article XII, §16 of the California Constitution, the California Supreme Court has held that it "relates to the place of trial, not merely to the place where an action may be commenced." *Ray Wong v. Earl C. Anthony, Inc.,* 199 Cal. 15.

VIII

INSUFFICIENT SHOWING FOR DISMISSAL

An F.E.L.A. case can only be transferred from one federal district to another in federal courts because of the specific provision in §1404 (a) of the Judicial Code allowing transfer—but not dismissal. This section only speaks to federal courts. "It does not speak to state courts" to allow either transfer or dismissal of an F.E.L.A. action. *Pope v. Atlantic Coast Lines,* 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849.

In *Everprest, Inc. v. Phillips-Van Heusen Corp.,* 300 F.Supp. 757, the Court says charges of forum shopping as to transfer in federal courts are given least attention where, as here, venue rests on a specific Congressional grant rather than on a general provision.

In federal courts, the showing made in this case would not even justify transfer, much less the drastic action of dismissal as is here decreed. To obtain a

transfer in federal court under Judicial Code 1404 (a) for the convenience of the parties and witnesses in the interests of justice, defendant must show among other things:

1. What witnesses will be called at the trial and the materiality of their testimony and that the testimony is essential to the defense. (This record shows the witnesses are favorable to the plaintiff's case. Defendant may not be heard to complain about inconvenience to plaintiff's witnesses. There is no issue raised as to any convenience of witnesses to liability and defendants have no right to worry about plaintiff's convenience.

Clendenin v. United Fruit Co., 214 F.Supp. 137;
Heiser v. United Air Lines, 167 F.Supp. 237;
Cline v. New York Central, 193 F.Supp. 206;
Marks v. Fireman's Fund Ins. Co., 109 F.Supp. 800 at 803;

Dillman v. Superior Court, 205 Cal. App. 2d 769, 74 A.L.R. 2d 64, 65, and like cases put the burden *on the defense of showing the convenience of what witnesses and in relation to what issue.*

Hohler v. Pennsylvania R. Co., 140 F.Supp. 487;
Perry v. A.T.&S.F. Ry. Co., 82 F.Supp. 912.

2. As in California, in federal court on a request for transfer for convenience of witnesses, the burden is on the defense of showing the convenience of what witnesses and in relation to what issue. *Dillman,* supra.

3. As in California, the convenience of employee witnesses should present no problem of transportation to a defendant railroad.

Houghton v. Pa. R. Co., 85 F.Supp. 761, 763;
Belair v. New York, N.H.&H.R. Co., D.C.S.D. N.Y. 1950, 88 F.Supp. 572, 573;
Security Invest. Co. v. Gifford, (1916) 179 Cal. 277, 176 P. 444;
Pacific States Corp. v. Shepardson (1930) 105 Cal. App. 747, 288 P. 714.

IX

THE VENUE PROVISION IS AN INHERENT PART OF F.E.L.A.

The venue provision is an inherent part of F.E.L.A. In line with the humanitarian and liberal purposes of the Act, the plaintiff's right to choose the venue has been considered as a "substantial right" and the United States Supreme Court has said that plaintiff's choice of forum "should rarely be disturbed."

Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 126, 94 L.Ed. 55;
Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055.

Similarly, in *Akerly v. New York Central R. Co.*, 168 F.2d 812, the Sixth Circuit judges concur that the F.E.L.A. "makes the venue provision an inherent part of the employer's liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability, and is void."

There is no statute giving state courts the right to transfer or dismiss, and the passage of 1404 (a) of Judicial Code required a statutory provision to give the federal courts limited rights to transfer, but not to dismiss.

X

Article VI of the United States Constitution establishes the supremacy of the federal law and makes it clear that a state court must assume jurisdiction of an action created by federal law. The F.E.L.A. specifically provides: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states." (45 U.S.C.A. §56). The removal of F.E.L.A. cases from state to federal courts is prohibited.

Burnett v. N.Y. Cent. R. Co. (Ohio) 85 S.Ct. 1050, 380 U.S. 424, 13 L.Ed.2d 941.

In *Miller v. Municipal Ct.*, 22 Cal. 2d 818, the Court held as to the F.E.L.A. that it must be considered as settled that no argument may be asserted of hardship resulting from the additional burden of litigation in state courts to enforce federal laws. In this connection, the United States Supreme Court said:

> "We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

XI

In *Schultz v. U.P.R. Co.*, 118 Cal. App. 2d 169 (May 1953), Mr. Justice Vallee with Justices Shinn and Wood concurring, wrote an exhaustive and well-reasoned opinion rejecting the doctrine of forum non conveniens in California as to F.E.L.A. cases. The state Supreme Court denied a petition for a hearing with Justices Shenk, Carter and Traynor voting to deny a hearing and Justices Edmonds and Spence voting for a hearing and Justice Shauer not participating.

Then, ten months later, without any statutory change intervening to change the law, Mr. Justice Shauer, with a strong dissent from Mr. Justice Carter, urging the points made in *Schultz* (supra) and others, decided that the doctrine of forum non conveniens could be applied in California as to F.E.L.A. cases. *Price v. A.T.& S.F.*, 42 Cal. 2d 577.

Now, eighteen years later, it is apparent that the *Price* case was unsound in various particulars, and that the *Schultz* case more correctly stated the law in many ways.

In the first place, Mr. Justice Carter in his dissent in *Price* said:

> "The holding of the majority in this case injects into the law of this state for the first time in its entire judicial history the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal. This holding places it within the power of a trial court to dismiss a transitory action which arose out of

this state, even though plaintiff was a citizen of this state, and had a statutory right to prosecute such an action in the courts of this state."

So, in *Thomson v. Continental Ins. Co.*, 66 Cal. 2d 738, *Price* was modified by the California Supreme Court in an opinion by Mr. Justice Peters, holding that the maxim of forum non conveniens does not apply to a California citizen, as *Price* implied. Mr. Justice Peters said, as did Mr. Justice Jackson in *Mayfield*, when his vote made the majority of five, that the maxim of forum non conveniens "is typically applied to litigation where all of the parties are out-of-state residents." If this is the rule, then whenever an out-of-state plaintiff sues a railroad at its principal place of business in California, he is suing a resident on a transitory action and the maxim of forum non conveniens cannot apply. Since this has been and is the rule in California, *Price* must be further limited so that it really can't apply to an F.E.L.A. case brought against a railroad at its principal place of business in California. Otherwise, there would clearly be a denial of the "privileges and immunities" of citizens of the United States, since any citizen can always sue in California on a debt against any railroad doing business in California, or where the defendant railroad can be found, and certainly at its principal place of business.

So, also, and not covered in the *Price* case, the *Price* case failed to consider the effect of Article XII, §16 of the California Constitution.

XII

CALIFORNIA LAW ALLOWS TRANSITORY ACTION DEBT WHERE DEBTOR IS FOUND

An F.E.L.A. action is a suit on a debt.

Hansen v. Cramer, 39 Cal. 2d 321, 245 Pac. 2d 1095 at 323:

> "It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues."
>
> *Estate of Waits,* 23 Cal. 2d 676.

Anybody, resident or non-resident, can sue a corporation at its principal place of business in California (or where it does business, for that matter). Art. XII, §16, California Constitution.

This constitutional provision "relates to the place of trial, not merely to the place where an action may be commenced, and it applies to actions sounding in tort as well as to actions upon contract." *Wong v. Anthony,* 199 Cal. 15; *Searles v. Greyhound,* 180 Cal. App. 2d 463, 4 Cal. Rptr. 206; *Shida v. Japan Food,* 185 Cal. App. 2d 443.

A corporate defendant's right to trial at its residence "is an ancient and valuable right and well supported." *Fidelity Thrift v. Hall,* 186 Cal. App. 2d 895. In the case at bar, however, the Southern Pacific claims and the Court has held it is inconvenient for the Southern Pacific to be sued at its principal place of business!

Thus, it is clear that an F.E.L.A. suit on a debt against a railroad corporation at its principal place of

business is for a non-resident plaintiff only one of many transitory causes of action recognized as enforceable in our state under both our Constitution and case law.

In fact, in *Price v. A.T.& S.F.* (supra), Mr. Justice Shauer conceded:

> "It is unquestioned that the courts of this state have accepted and exercised jurisdiction over transitory causes of action which arose outside of California in favor of citizens of other jurisdictions, nonresident in California, whether based on the common law or a statute of a sister state or a statute of the United States (see *Schultz v. Union Pacific R.R. Co.* (1953), 118 Cal. App. 2d 169, 178 [257 P. 2d 1003]," and authorities cited in footnote 17, 118 Cal. App. 2d 178).

Mr. Justice Shauer also cites with approval at p. 582 of *Price*, supra, *Loranger v. Nadeau*, 215 Cal. 362, 366, holding that:

> "It is settled law in the United States that . . . as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found."

Similarly, Mr. Justice Shauer at p. 583 of the *Price* case, cites with approval *Estate of Waits*, 23 Cal.2d 676, where Mr. Justice Traynor wrote the opinion holding that the Federal Employers' Liability Act creates a debtor-creditor relationship; and the debt being transitory may be enforced wherever the debtor can be found. As to this, he said:

"It would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

XIII

THIS DECISION VIOLATES THE "PRIVILEGES AND IMMUNITIES" CLAUSE

Mr. Justice Shauer sought to justify the *Price* decision on the basis of the decision of the United States Supreme Court in *Missouri v. Mayfield,* 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3, which held that Missouri could "deny access to its courts to persons seeking recovery under the F.E.L.A. if in similar cases the state, for reasons of local policy, denies resort to its courts and enforces it policy impartially . . . so as not to involve a discrimination against F.E.L.A. suits and not to offend against the Privileges and Immunities Clause of the Constitution." Citing *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 as to the Privileges and Immunities Clause.

Article IV, §2 of the United States Constitution (U.S. Code Ann.), pages 508, 597: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

So, in *Schultz,* p. 169, 118 Cal. App. 2d, at p. 175 [3], Mr. Justice Vallee, for the appellate court, hearing denied by Supreme Court, held:

"Where a state court would exercise its jurisdiction of a transitory action not arising under the

> Federal Employers' Liability Act, it may not decline to exercise it merely because the action is brought under the act. . . .

Similarly, on the remand of the *Mayfield* case, on which *Price* professes to be based, from the United States Supreme Court to the Supreme Court of Missouri, Missouri held that Missouri must entertain the F.E.L.A. action for the non-resident for the accident which happened outside the state of Missouri:

> "The policy of this state has been to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject matter, and this applies to citizens who are residents as well as non-residents . . . Since the policy of this state has been, and is, to allow citizens of Missouri (resident and non-resident) to bring and maintain suits under the Federal Employers' Liability Act in the courts of this state, we cannot bar citizens of other states from doing likewise." (Certiorari was denied.)

Furthermore, to reject specifically the thought that since Congress by 1404 (a) allowed a transfer of F.E.L.A. actions from one federal district to another, this might apply to *dismissals* in state courts, *Schultz* further cites the U.S. Supreme Court in *Pope v. Atlantic,* p. 177, which held as to 1404 (a) and transfer as related to dismissal in state courts: "It does not speak to state courts." At p. 583 of *Price,* supra, Mr. Justice Shauer concedes: ". . . there is no statutory authorization for such transfer by state courts . . ." The *Pope* case is the last word on the subject from the United States Supreme Court.

Mr. Justice Vallee in *Schultz*, supra, and even Mr. Justice Frankfurter in *Mayfield* had in mind what was said in *Mayfield*, supra,

> "If in similar cases the state for reasons of local policy denies resort to its courts and enforces its policy impartially, see *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges and Immunities Clause of the Constitution."

and what was said in *Miles:*

> "To deny citizens from other states, suitors under F.E.L.A. access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause, Constitution, Art. IV, §2; *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233."

Similarly, in *Lansverk v. Studebaker* (Wash. 1959), 338 Pac. 2d 747, and in *State, etc. v. Dist. Ct.* (Mont.) 365 Pac. 2d 512, Washington and Montana have refused to apply the maxim of forum non conveniens, holding that since they hear transitory actions as on a debt wherever the debtor can be found, they cannot discriminate against those who bring such actions, whether resident or non-resident:

> ". . . an action for damages for personal injuries is transitory, and . . . though the injuries may have been sustained in some other state, the action could be commenced in the state wherever service on a defendant may be had."

The above should make it clear that when Mr. Justice Peters in *Thomson v. Continental Ins. Co.*, supra,

modified the *Price* case, he gave the maxim of forum non conveniens all the recognition to which it is entitled when he said that it "is typically applied to litigation where all of the parties are out-of-state residents." In the case at bar, Southern Pacific is being sued at its principal place of business and residence!

So, we can concede that there is a doctrine of forum non conveniens which may apply to out-of-state residents as to out-of-state torts. *Price,* as modified by *Thomson,* so holds, and Mr. Justice Carter back in *Leet v. U.P.,* 25 Cal. 2d 605, so recognized. Subsequently, the maxim has been put into C.C.P. §140.30, but in doing so the legislature in C.C.P. §410.10 took care to state:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Cf. Art. XII, §15 and §16 and the United States Constitution re privileges and immunities, 14th Amendment, Article IV, §2.)

In any event,

XII

FEDERAL LAW GOVERNS

In *Dice v. Akron, C. & Y.R. Co.,* 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312, Mr. Justice Black held that:

> ". . . only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purpose . . . Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the Federal Acts Administration

> [and so he held that a jury trial is] 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.' And he held that to deprive them of this 'is to take away a *good portion of the relief which* Congress has afforded them.'"

Similarly, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 22 L.Ed.2d 344, this Court held that the need for uniformity in enforcing the Railway Labor Act prevents the exercise of state authority which might impose inconsistent standards or judicial legislation.

The supremacy clause, Article VI of the United States Constitution, reads:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Corfield v. Coryell, 4 Wash. C.C. 571, 580:

> "One of the privileges and immunities of citizens of the several states is the right 'to institute and maintain actions of any kind in the courts of the state.'"

To the same effect, see *Cole v. Cunningham*, 133 U.S. 107, 114.

Mr. Justice Moody in *Chambers v. B. & O. R.R.*, 207 U.S. 142 at 148: re fundamental principles:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is

> the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal constitution.
>
> ". . . any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

In order to justify the statement that it is against the public policy of California to enforce in its courts a cause of action in favor of a citizen of another state, it must first appear that it would be against the public policy of California to enforce a like cause of action in favor of a citizen of California. But citizens of California are regularly allowed to sue railroads on F.E.L.A. actions, and California has never refused to entertain F.E.L.A. or similar actions as being against the public policy of this state.

So, when Mr. Justice Peters modified *Price*, supra, in *Thomson v. Continental Ins. Co.*, supra, by holding that *Price* could not be construed to deny a citizen of California a right to sue in California the corporation where found on an out-of-state transaction,

thereafter, it became clear that *Price* could no longer be construed contrary to the *Chambers* case, supra, holding that

> "Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Stewart v. B. & O., 168 U.S. 445 (1897), p. 448, which holds:

> "An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Co.*, 103 U.S. 11."

A state cannot discriminate against rights which arise under federal law.

Allendorf v. Elgin, J. & E. Ry. Co. (1956), 133 N.E. 2d 288, 8 Ill. 2d 164, 79 A.L.R. 2d 241, cert. den., 77 S.Ct. 49, 352 U.S. 833, 1 L.Ed.2d 53, Reh. den., 77 S.Ct. 219, 352 U.S. 937, 1 L.Ed.2d 170.

McKnett v. St. Louis & S.F. R. Co., 292 U.S. 230, 78 L.Ed. 1227, 54 S.Ct. 690—if Alabama expressly permits actions of the same class, then it cannot decline jurisdiction solely because the suit it brought under a federal law.

> *State v. Mayfield*, 362 Mo. 101, 240 S.W. 2d 106.

In spite of the fact that Governor Earl Warren vetoed California Senate Bill 789 providing for a forum non conveniens and that Congress refused to

pass the Jennings Bill which was H.R. 1639, 80th Congress, First Session, providing that the plaintiff must sue where the accident happened, we are now told that the California court can by judicial legislation achieve what railroads and their lobbies failed to gain by legislative action. This judicial legislation is justified by invoking the so-called maxim of "forum non conveniens." Detailed consideration of this maxim reminds one of Dean Pound's wise comment that "most maxims should be called minims, as they compress a minimum of sense into a maximum of pretentiousness."

United States Code Annotated, Constitution, Amendment 14, U.S.C.A. on Due Process of Law, page 3, §1, states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens . . .
>
> ". . . nor deny to any person within the jurisdiction the equal protection of the laws."

Similarly, in *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, Reed, J. for the Court stated:

> "To deny citizens from other states, suitors under F.E.L.A. access to its courts would, if permitted access to its own citizens, violate the Privileges and Immunities Clause, Constitution Art. 4, §2: *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233."

We mention, in passing, the recent case of *Great No. R. Co. v. Curtin*, 12 Cal. App. 3d 105, which never even approached the legislative history and

purpose of the Federal Employers' Liability Act. The case followed by the Appellate Court in *Curtin*, supra, and setting forth certain tests to be considered in applying the so-called maxim of forum non conveniens was the case of *Gulf Oil v. Gilbert*, 33 U.S. 501 (1947) which was not an F.E.L.A. case and which was argued in connection with diversity of citizenship problems where the federal court requires the burden of proof to be on the plaintiff to show that he is properly in the federal court and where the court was considering questions of transfer or dismissal of cases not properly brought under the diversity rules. This type of litigation has no relationship at all to the rights of a plaintiff in an F.E.L.A. case under the 1910 amendment, and its purpose as stated by Senator Borah where the plaintiff has the choice of forum, or the subsequent decisions holding that the state courts have no right to dismiss under 1404(a); but that statute is limited to federal courts which are merely given the right to transfer under 1404(a), which is an entirely different procedure from denying the remedy by an outright dismissal.

In 1942, in *Scott v. Burke*, 39 Cal. 2d 388, Mr. Justice Schauer, who wrote the *Price* opinion, reviewed a judgment involving a case brought by nonresidents living in Arizona with the accident happening in Arizona. The defendant was found and served on the debt action in California. No question was raised about venue, but if one had been raised, there can be no doubt that the court would have held as in *Lorange v. Nadeau*, supra (cited in *Price* with

approval) that this transitory action could be brought against the debtor wherever he is found, even though the plaintiffs are non-resident and the accident happened in Arizona. But Mr. Justice Shauer, in *Price*, two years later, denied *Price*, another citizen of Arizona, the same rights he had earlier accorded to Scott, as a citizen of Arizona, suing a California resident on the debt arising out of an Arizona accident!

Similarly, in January, 1970, the case of *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, decided by Judge Molinari, who participated in the *Curtin v. Great Northern*, supra, decision allowed a suit in California against a Michigan corporation where plaintiff and her children were residents of Oregon and the accident took place in Oregon. No question was raised about venue, but if one had been raised, it would have been overruled on the basis of the law that the plaintiff can always sue the debtor corporation on a debt wherever he finds him. *Loranger v. Nadeau*, supra, Article XII, §16 of the California Constitution, *Searles v. Greyhound*, 180 Cal. App. 2d 463.

In *Loranger v. Nadeau*, supra, the non-resident plaintiff sued the California resident defendant on a traffic accident happening in Oklahoma City. When the question of venue was raised, the California Supreme Court held as to this action in tort ". . . as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found." But in the case at bar, on a transitory tort action, Judge Brown has held that this non-resident F.E.L.A. plaintiff cannot maintain his suit against the defendant

where he is found, nor even at his principal place of business. His case is dismissed. This is the denial of the Privileges and Immunities Clause of the United States Constitution as pointed out in *Schultz,* supra. Mr. Justice Peters in *Thomson v. Continental,* supra, held that a citizen of this state can always sue and maintain his case where he finds the corporate debtor. So the *Schultz* case clearly states the law now following *Thomson* and modifying *Price* as stated at p. 181 of *Schultz:*

> "The courts of California have consistently entertained causes based on transitory causes of action against foreign corporations doing business in this state, brought by a citizen of this state where the tort occurred outside the state. Since a citizen of this state, resident or nonresident, has the privilege of suing any person or corporation who may be found in the state on a transitory cause of action which arose outside the state, a citizen of a sister state has the same privilege secured by him by the Constitution of the United States."

Similarly, in *Estate of Waits,* 23 Cal. 2d 676, Mr. Justice Traynor stated:

> "A debt will be regarded as an asset wherever the debtor is subject to suit . . . The F.E.L.A. makes defendant subject to suit on this cause of action wherever defendant does business."

In commenting on the *Estate of Waits, Schultz* states:

> "It is implicit in this reasoning that California courts will entertain an action for damages on a cause of action arising without the state under

> the Federal Employers' Liability Act by a non-resident against a corporation doing business in this state since 'it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action.'"

Schultz, supra, further cited in the footnotes at pp. 178-179 other cases of actions by non-residents on torts committed outside the state of California involving various cases of death, injury, fraud and deceit. If the decision of Judge Brown in the case at bar is allowed to stand, only the F.E.L.A. plaintiff who sues the corporate defendant where he finds him (and even at his principal place of business, as here) will be dismissed if he sues where he has a right to bring and maintain his action. Could there be a more flagrant case of the denial of the Privileges and Immunities Clause of the Federal Constitution?

Is C.C.P. §410.10, reading,

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States,"

applicable to C.C.P. 410.30 and C.C.P. 904.1 (c) as it may be interpreted to discriminate against F.E.L.A. plaintiffs in the light of the federal constitution and also Article XII, §16, allowing transitory actions against corporations where they are found in California and relating to the place of trial and not merely the place where an action may be commenced? See *Searles v. Greyhound Corp.* (1960) 180 Cal. App. 2d 463.

XIII

THE RAILROAD DEFENDANT IS RESIDENT IN CALIFORNIA FOR VENUE PURPOSES

Since the *Mayfield* case and following the *Pope* case, *Pure Oil Co. v. Suarez* (1966) 384 U.S. 202, 15 L.Ed.2d 474, 86 S.Ct. 1395, further modified the *Mayfield* and *Price* cases. These cases point out in the light of 28 U.S.C. §1391 (c), a Jones Act or an F.E.L.A. defendant is resident wherever it is doing business. 28 U.S.C. §1391 (c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Consequently, a motion to transfer on grounds of forum non conveniens is properly denied if the plaintiff chooses to sue the defendant at its residence. In this connection, the United States Supreme Court in *Pure Oil,* supra, goes back to the first point made in this brief as to Congressional intent, and states that the purpose of the law was to give these injured men "substantive rights and a generous choice of forum for their vindication."

Similarly, in *Pierce v. Elk Towing Co.,* 36 F.2d 504, decided on rehearing August 3, 1966, the Circuit Court of Appeals reversed the lower court for not applying the expanded revision of the Judicial Code, 28 U.S.C.A. §1391 (c) on the authority of United States Supreme Court decision in *Pure Oil v. Suarez,* supra.

In this regard, see *Blanco v. Gulf Coast,* 235 F. Supp. 196 at 201 and the specific provisions of the Jones Act, §688, 46 U.S.C.A., providing that the Jones Act and the Federal Employers' Liability Act are read together.

In line with the *Pure Oil* decision, supra, the more recent cases have been holding that seamen should not be restricted as to where they may look for satisfaction of their rights, and of course the same rule applies under F.E.L.A.

Goodin v. Sinclair Refining Co., 378 F.2d 576;
Harley v. Sioux City, 379 F.2d 356;
Flaiz v. Moore, 353 S.W.2d 74 (Texas).

In line with *Pure Oil,* saying that ". . . the basic intent of the Congress is best furthered by carrying the broader residence definition of §1391(c) into the Jones Act, and in line with the *Estate of Waits,* supra, in California, holding that a debt is transitory and the F.E.L.A. is such a debt which may be enforced against the debtor wherever you find him, this case does not even apply to the type of litigation mentioned in *Mayfield* or in *Thomas v. Continental Insurance Co.,* 66 Cal. 2d 738, that the maxim of forum non conveniens "is typically applied to litigation where all of the parties are out-of-state residents." In *Mayfield,* Mr. Justice Jackson speaks of providing a court "for two non-resident parties to litigate." In the light of the *Pure Oil* decision and 28 U.S.C. 1329 (c), if the defendant is doing business and running a line of railroad in California, California, by this

very statute, is to be "regarded as the residence of such corporation for venue purposes."

CONCLUSION

The 1908 Federal Employers' Liability Act was construed to limit venue and jurisdiction to the principal place of business of the defendant railroad. The Taft administration felt that this was too narrow a choice to allow the injured man the proper redress, and Senator Borah sponsored the bill in the Senate to broaden the venue and jurisdiction to allow the injured man to choose wherever the railroad did business to pursue his action.

The instant case was brought under the Federal Employers' Liability Act at the principal place of business of the Southern Pacific Transportation Company in San Francisco. Judge Rolph as a law and motion judge ruled that plaintiff had the right to maintain his action in San Francisco, and he denied the railroad's motion to dismiss.

Then, 25 months after answer, another law and motion judge, Judge Brown, on conflicting declarations as to the facts and after the statute of limitations had run, and after many, many months of delay, decided to dismiss the case on the grounds of forum non conveniens.

Thus, we have the anomalous situation that where Congress had first provided that the only place in which a plaintiff could bring his case would be at

defendant's principal place of business (and this was recognized to be an ancient and valuable right of the defendant), now this plaintiff is denied the right even to sue at the principal place of business.

Earlier, the Jennings Bill had sought to limit the plaintiff's right to sue at the place of the happening of the accident, and Congress refused to pass this law. Judge Brown now rules that this is where the plaintiff must sue to maintain his action, and that his suit against the railroad must be dismissed at the railroad's principal place of business.

In the face of the clear legislative intent to broaden the venue, when this law was passed sixty years ago to make it more liberal for the plaintiff to get away from unfriendly doctors or small towns where the judge might be a former railroad attorney and the only attorney in town might be the railroad lawyer, it is incongruous that at this late date, the legislative intent of this national and uniform law should be so rudely frustrated at the whim and caprice of a law and motion judge who might not be friendly to this type of litigation or to the idea that it is his duty to follow the Congressional mandate, even though he may think the law should be that the case must be tried where the accident happened.

This all arises because some judges have been mesmerized by the phrase "forum non conveniens" and consequently by judicial legislation they are willing to go along with a fuzzy conception that under this guise they can change the law in the following important particulars:

1. The state courts have the duty to enforce this law, and there is no federal legislation authorizing the dismissal of a state court action. This was so held in the last case before the United States Supreme Court on the subject in *Pope v. Atlantic Coast Lines,* supra.

2. While it is true that Judicial Code 1404(a) allows the transfer of an F.E.L.A. case in federal courts, this does not apply in state courts, and in state courts, the effect of forum non conveniens is to dismiss the case rather than to transfer it. The *Pope* case has held there is no such federal legislation to allow this. The authority used by the appellate court in California in the *Curtin* case is not an F.E.L.A. case, but is a diversity of citizenship case where the legislative history and background and applicability of the law are not at all the same.

3. Federal law governs. The mere enactment of the statute in California allowing the consideration of the maxim of forum non conveniens in an appropriate case does not nullify or change or affect the federal law.

4. For California to apply forum non conveniens to an F.E.L.A. case, the State Constitution would have to be changed if the suit is brought against a domestic corporation, as an F.E.L.A. suit is classed as one on a debt, and a domestic corporation can always be sued on a debt by a non-resident at the defendant's principal place of business.

5. To discriminate against a non-resident F.E.L.A. plaintiff who sues a domestic corporation on an

F.E.L.A. debt at its principal place of business would be to deny privileges and immunities of a citizen in contravention of the United States Constitution, and also in contravention of the California State Constitution, Article XII, §16.

We have now reached the point where it must be obvious and inescapable that the dissenting opinion of Mr. Justice Carter in the *Price* case correctly states the law. This case is an excellent example of what Mr. Justice Carter predicted would happen following from the broad and not fully analyzed decision in the *Price* case.

> "The incidental injustice to a railroad in an isolated or exceptional case resulting from the exercise of the right to choose forum is as nothing compared to the chaos, confusion, and gross injustice that results in cases where the plaintiff must first litigate for months on end his venue selection, with affidavits, motions, briefs, hearings, and numerous delays, and with one judge in one particular case sustaining jurisdiction over a certain railroad company and another judge in the adjoining courtroom denying it. To have the venue of actions determined by such a system is not rule by law, but rule by whim and caprice. On the same identical state of facts conflicting and varying decisions may be handed down by different courts and a great volume of litigation is thus bound to rise over preliminary questions."

This liberal court should not require an F.E.L.A. railroad employee to be thus shoved around and delayed and frustrated in asserting his remedy. This is also contrary to the Congressional intent and the

humanitarian purposes of the law. In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 2 L.Ed.2d 799, 78 S.Ct. 758, the United States Supreme Court (Brennan, J.) said that the F.E.L.A.

> ". . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety . . . The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the F.E.L.A. seeks to adjust that expense equitably between the worker and the carrier . . . The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden."
>
> S. Rep. No. 460, 60th Cong., 1st Session 3.

This outlook is certainly not consistent with the maxim of forum non conveniens as the defense would apply it to require the plaintiff to try two cases to get one decided or to force him to bring his case where the accident happened even though Congress has refused so to legislate.

Unless the limitations we outline as to domicile, residence and legislative purpose are recognized by this Court and clearly set forth as guides for the future, in the process of forcing an F.E.L.A. plaintiff to try two cases to get one decided and in asking trial and appellate judges by affidavits to resolve nice-

ties requiring "an apothecary's scale and a crystal ball, neither of which instruments are available to the court," much injustice will result and as Mr. Justice Carter foretold in his dissent in *Price,* this pretentious maxim of forum non conveniens can become "the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal." This will be achieved by the railroads as to F.E.L.A. injured employees contrary to the legislative intent and by judicial legislation contrary to similar legislation rejected by Congress in the Jennings Bill and by Governor Warren in California in vetoing Senate Bill 789 which purported to incorporate the maxim of forum non conveniens into the law of this state. As to this, Governor Warren said:

> "If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose its national uniformity and could at least substantially weaken the purposes for which the act was originally designated. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events, if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple Act of Congress."
>
> *Price v. A.T. & S.F.,* 42 Cal. 2d 577, 590, 268 Pac. 2d 457 (quoted by Judge Carter without contradiction or opposing comment).

We respectfully request this Court to review this case and to bring it in line with this Court's decision in *Pope v. Atlantic Coast Lines,* 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849. There is no statutory or other authority for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A. §56). If California allows non-resident transitory plaintiffs to sue for a debt where the debtor may be found in California, it is a denial of the equal protection of the laws under *McKnett v. St. Louis & S.F. R. Co.,* 292 U.S. 230, 78 L.Ed. 1227, 54 S.Ct. 690, to discriminate against the non-resident F.E.L.A. plaintiff who sues a railroad debtor on a transitory action arising out of federal law.

Dated, Oakland, California,
April 6, 1972.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

(Exhibits Follow)

Exhibit A

In the Superior Court of the State of California
in and for the City and County of San Francisco

Department Seventeen

Honorable Henry R. Rolph

No. 601015

James W. Fitzgerald,
Plaintiff,

vs.

Southern Pacific Company,
a corporation,
Defendant.

MEMORANDUM DECISION

The motion of the defendant to dismiss the complaint upon the doctrine of forum non conveniens is denied.

The defendant will have twenty (20) days to answer or otherwise plead.

Counsel for plaintiff will prepare an order consistent with the foregoing for the signature of the Court.

Dated: August 6, 1969.

/s/ Henry R. Rolph
Henry R. Rolph
Judge of the Superior Court

Filed August 6, 1969,
Martin Mongan, Clerk.

Exhibit B

In the Superior Court of the State of California in and for the City and County of San Francisco

Department Seventeen

Honorable Henry R. Rolph

No. 601015

James W. Fitzgerald, Plaintiff,

vs.

Southern Pacific Company, a corporation, Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT UPON THE DOCTRINE OF FORUM NON CONVENIENS

It is Hereby Ordered that the motion of the defendant to dismiss the complaint upon the doctrine of forum non conveniens is denied.

Dated: September 12, 1969.

Henry R. Rolph
Judge of the Superior Court

Filed September 12, 1969,
Martin Mongan, Clerk.

Exhibit C

Robert W. Taggart
Corrigan and Taggart
Attorneys at Law
One Market Street, Room 842
San Francisco, California 94105
Telephone: 362-1212
Extension: 22235
Attorneys for Defendant
Southern Pacific Company

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 601015

James W. Fitzgerald,
Plaintiff,
vs.
Southern Pacific Company,
et al.,
Defendants.

AGREEMENT TO CONDITIONS OF DISMISSAL

Defendant, Southern Pacific Company, by and through its attorney, Robert W. Taggart, hereby agrees to those conditions set forth in the Notice of Intended Decision dated September 13, 1971.

1. Defendant, Southern Pacific Company, agrees to submit to personal jurisdiction in either the Supreme Court of the State of Texas, or the United States District Court sitting in El Paso, Texas.

2. Defendant, Southern Pacific Company, agrees to waive any applicable statute of limitations for the period of one year commencing September 13, 1971.

3. Defendant, Southern Pacific Company, agrees to make all of its business records available in Texas to the same extent as the same would be available if the case were pending in the County of San Francisco, both in discovery proceedings and at the time of the trial of this action.

Dated: September 20, 1971.

Corrigan and Taggart
By Robert W. Taggart
Robert W. Taggart, Attorney for
Southern Pacific Company

Certificate of Mailing (C.C.P. 1013(a)2015.5)

The undersigned, at San Francisco, Calif., certifies to be true, under penalty of perjury, that she is a citizen of the United States over 18 years of age and is not a party to the within action: business address is One Market Street, San Francisco, California 94105: she executed this certificate and served a true copy of the foregoing document by mail placing same in an envelope, sealing, fully preparing postage thereon, and depositing said envelope in U. S. Mail at San Francisco, California on the 21st day of Sept. 1971; said envelope was addressed as follows:

Hildebrand, McLeod & Nelson
Attorneys at Law
1212 Broadway, Room 830
Oakland, California 94612

Attention Charles McLeod, Esquire
Claudine L. Shuey

Exhibit D

Robert W. Taggart
Corrigan and Taggart
Attorneys at Law
One Market Street, Room 842
San Francisco, California 94105
Telephone: 362-1212
Extension: 22235

Attorneys for Defendant
Southern Pacific Company

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 601015

James W. Fitzgerald,
Plaintiff,
vs.
Southern Pacific Company,
a corporation, et al.,
Defendants.

ORDER OF DISMISSAL FORUM NON CONVENIENS

The motion of the above-named defendant to dismiss the above-entitled cause on grounds of forum non conveniens came on regularly for hearing on June 9, 1971. Clifton Hildebrand, appearing for plaintiff, Robert W. Taggart, appearing for defendant, and memoranda and affidavits in support thereof having been served and filed, and evidence, both oral and

documentary having been introduced, and the cause having been presented by counsel for both parties, and the court being fully advised in the premises:

The court finds that good cause has been shown and that this cause should be dismissed on the grounds of forum non conveniens. The court finds that, in the interest of substantial justice, this action should be heard in a forum outside this state, specifically in the Texas State or United States District Court sitting in El Paso, Texas. Applying the criteria set forth by the Court of Appeal in *Great Northern Ry. Co. v. Superior Court,* 12 C.A.3d 105 (1970) this court is persuaded that those factors preponderate heavily in support of defendant's renewed motion to dismiss. While this court is aware that this motion was previously denied by another Judge of this court, this court now finds that said Judge was misled by declarations filed on behalf of plaintiff and further finds that plaintiff was examined by doctors located in the Bay Area for the purpose of retaining the case in this Court rather than for purposes of treatment.

Accordingly, defendant's renewed motion to dismiss under C.C.P. § 410.30, heretofore submitted, is granted, upon the following conditions:

1. Defendant agrees in writing to submit to personal jurisdiction in either the State Court or the United States District Court sitting in El Paso, Texas.

2. Defendant agrees in writing to waive any applicable statute of limitations if plaintiff commences suit within one year from the date of this order. This

order shall not operate to reduce any applicable period of limitations.

3. Defendant agrees in writing to make all of its business records available in Texas to the same extent as the same would be available if the case were pending here, both in discovery proceedings and at the trial.

The court finds that defendant has complied with said conditions by written stipulation filed with this court on September 21, 1971, and accordingly,

It Is Ordered that this cause be dismissed.

Dated, November 30, 1971.

Ira A. Brown
Judge of the Superior Court

Filed December 1, 1971,
Martin Mongan, Clerk.

Exhibit E

In the Court of Appeal State of California
First Appellate District

Division One

1 Civil No. 30,809

James W. Fitzgerald,
Petitioner,

vs.

Superior Court, City and County of San Francisco,
Respondent.

Southern Pacific Company,
Real Party in Interest.

BY THE COURT:

The petition for a writ of mandate is denied.

Dated, Jan. 7, 1972.

Molinari, P. J.

Filed Jan. 7, 1972.
Clifford C. Porter, Clerk.

Exhibit F

Clerk's Office, Supreme Co.
4250 State Building
San Francisco, California 94102

Feb. 3, 1972

Dear Sir: I have this day filed Order Hearing Denied.

In re: 1 Civ. No. 30,809
Fitzgerald
vs.
San Francisco Co. Superior Ct.

Respectfully,
G. E. Bishel, Clerk.